

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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DEC - 8 2003

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS AYERS OIL COMPANY,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 03-214
(LUST Appeal)

NOTICE OF FILING AND PROOF OF SERVICE

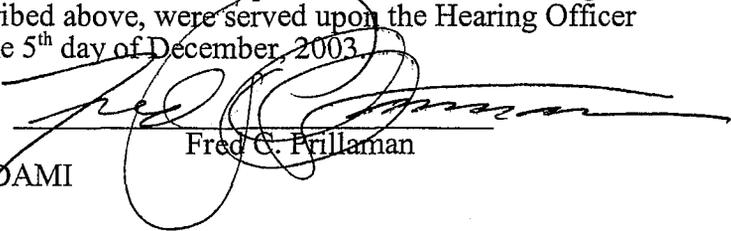
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PLEASE TAKE NOTICE that on December 5, 2003, we sent to the Clerk of the Illinois Pollution Control Board the originals and nine (9) copies each, via Federal Express, of Petitioner's Motion for Interlocutory Appeal from Hearing Officer Order and for Expedited Review Emergency Motion for Stay for filing in the above-entitled cause, copies of which are attached hereto.

The undersigned hereby certifies that true and correct copies of the Notice of Filing, together with copies of the documents described above, were served upon the Hearing Officer and the Respondent via hand delivery, on the 5th day of December, 2003.



Fred C. Prillaman

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**MOTION FOR INTERLOCUTORY APPEAL FROM HEARING
OFFICER ORDER AND FOR EXPEDITED REVIEW**

NOW COMES Petitioner, ILLINOIS AYERS OIL COMPANY, by its undersigned attorneys, pursuant to Sections 101.500, 101.504, 101.512, and 101.518 of the Board's Procedural Rules, 35 IAC 101.500, 101.504, 101.512, and 101.518, and for its Motion for Interlocutory Appeal from Hearing Officer Order and for Expedited Review thereof, states as follows:

INTRODUCTORY MATTERS

1. The Hearing Officer Order which is the subject of this motion (hereinafter "the subject Order") was entered on December 2, 2003, and is attached hereto as Exhibit A.
2. The subject Order denied Petitioner's Emergency Motion to Compel Discovery (hereinafter "Petitioner's motion") filed on November 25, 2003, a copy of which is attached hereto as Exhibit B.
3. In denying Petitioner's motion, the Hearing Officer agreed with the arguments presented by the Agency in its Response to Emergency Motion to Compel Discovery (hereinafter "the Agency's response"), filed on December 1, 2003, a copy of which is attached hereto as Exhibit C.
4. For the reasons appearing below, the subject Order was entered in error, and must be reversed.

5. For the further reasons appearing below, Petitioner will be materially prejudiced if the requested documents are not produced for review by Petitioner for possible use at the hearing, which resumes on January 7, 2004.

6. Petitioner respectfully requests that the Board grant this motion for interlocutory appeal, review the subject Order and the arguments herein expressed as to why the Order should be reversed, and reverse the subject Order by requiring the Agency to furnish the requested information, subject to whatever protections the Board deems appropriate in the circumstances.

7. In addition to the reasons appearing in Petitioner's motion (Exhibit B hereto, incorporated herein by reference), Petitioner respectfully advances the following arguments as to why the requested documents must be produced:

I. IT IS FUNDAMENTALLY UNFAIR TO ALLOW THE AGENCY TO ENFORCE AN INVALID RULE AGAINST PETITIONER.

A. The Agency has developed a rule entitled "Rate Sheet" (hereinafter the "Rate Sheet Rule"), being a statement of general applicability that implements, applies, interprets, or prescribes law or policy. The Agency applied the Rate Sheet Rule against Petitioner in this case. The Rate Sheet Rule, though, was not formally promulgated in accordance with APA rulemaking, and the factual basis for its formulation remains a secret, protected by the Subject Order from outside scrutiny. This is fundamentally unfair.

1. In this case, the Agency arbitrarily cut the rates of two categories of personnel presented in the budget under review: Professional Engineer (from \$150 per hour to \$130 per hour); and Project Engineer (from \$114 per hour to \$100 per hour). In making these reductions, the Agency enforced the Rate Sheet Rule against Petitioner. That Rule appears as Exhibit D hereto (as redacted by the Agency).
2. Specifically, the Agency Project Manager who reviewed Petitioner's budget submittal, Carol Hawbaker, testified that she is required to apply the Rate Sheet Rule in all cases:

Q. ***
Is it true that the applicant in this case in the application that's pending before the Agency -- strike that, before the Board at this time, reduced personnel costs from \$36,084 to \$32,514?

A. Yes, that is true.

Q. Okay. So there is a reduction overall?

A. Yes.

Q. But nevertheless you reduced it further, did you not?

A. Yes, we still felt it was a little excessive for the work that was being done.

Q. And you reduced both hourly rates and hours?

A. Yes.

Q. And the hourly rate reductions were based exclusively on the rate sheets for those categories, wasn't that correct?

A. Yes, that is true.

Q. And on no other basis than the rate sheets?

A. Right.

(Hawbaker deposition, page 55, lines 19-24 - page 56, lines 1-16, Exhibit E hereto).

Q. Then you reduced the rate of the Professional Engineer from 150 down to 130?

A. Correct.

Q. Now is it your testimony that you have never approved the rate of \$150 an hour for any Professional Engineer on any one of your budget reviews?

A. No, I would use the rate sheets.

(Hawbaker deposition, page 68, lines 7-14, Exhibit E hereto).

Q. And then you reduced the hourly rate of the project engineer from 114 down to 100, is it your testimony that [that was] based on the rate sheet?

A. Yes.

Q. And you're also testifying that you have never before approved a rate of one -- in excess of \$100 an hour for a Project Engineer on any one of your applications for budget review?

A. No, I don't believe so.

Q. And you don't know whether that has been an Agency-wide practice or not?

A. Well, so far as LUST Section?

Q. Yes.

A. I believe the practice is we are required to use the rate sheets.

(Hawbaker deposition, page 69, lines 20-24 - page 70, lines 1-10, Exhibit E hereto. [Emphasis added.]

3. Therefore, since the Rate Sheet Rule was not promulgated according to the APA and is of the type the courts have found invalid, the Board is not bound by it and, in fact, it has no legal or regulatory effect in this proceeding, and cannot be used by the Agency to cut rates. Platolene 500, Inc. v. Illinois EPA, PCB No. 92-9 (May 7, 1992). Petitioner respectfully moves the Board to make such a finding and enter such an order in this matter.

B. If the Board Does Not Find the Rate Sheet Rule to be Invalid, Then Petitioner Should Have the Right to Test the Validity of the Rule and the Database and Statistical Methods Used by the Agency to Develop It.

1. From the deposition of Brian Bauer, we know that he was the Agency person responsible for promulgating the Rate Sheet Rule:

Q. So you are the Illinois EPA employee who is responsible for compiling and managing the data used by the Illinois EPA's LUST Section as of March 28, 2003?

A. I did do it, yes.

Q. You did do that?

A. Yes.

Q. So that on that date when the Decision was made and the rate sheet was used, you're the person who was responsible for basically generating that document [the Rate Sheet Rule]; is that right?

A. Yes, I generated the document.

(Bauer deposition, page 26, line 16 - page 27, line 3, Exhibit F hereto).

Q. Have you from 1996 until today been the primary person who has refined the document that now appears as Plaintiff's Exhibit 3 [the Rate Sheet Rule]?

A. I've had my hand in it at the time.

Q. Would you say you're the primary person who has been the leader of the group that does this work?

A. Sure.

(Bauer deposition, page 32, line 23 - page 33, line 6, Exhibit F hereto).

2. In answering Interrogatory No. 7, Mr. Bauer explained how he developed the Rate Sheet Rule:

Q. 7. Is the Agency "fee" data base used to compile any type of ranges, averages, norms or statistics as to what fees and other charges are incurred by owners and operators conducting LUST projects in Illinois?

A. Yes, the Illinois EPA's LUST Section database is used for the purposes described.

Q. a) Identify the Agency employee(s) responsible for evaluating the data and/or compiling any of these ranges, averages, norms or statistics in the year 2003, together with their educational background, experience, training and/or other qualifications to so compile and/or evaluate.

A. Brian Bauer, EPS III, B.S. in Biology from Northland College, M.A. in Environmental Studies from University of Illinois-Springfield, employed with the Illinois EPA's LUST Section since April of 1992. Mr. Bauer has extensive experience in reviewing budgets submitted pursuant to the LUST program.

Q. b) Describe how these ranges, averages, norms or statistics are determined.

- A. A random selection of data is compiled, averaged, one standard deviation is calculated and then added to the average to yield a figure used as guidance when determining the reasonableness of a cost submitted in a budget.
- Q. c) Is all information related to fees and charges incurred by various owners and operators conducting all LUST projects in Illinois included in the data base and used for determination of these ranges, averages, norms or statistics?
- A. No.
- Q. d) If not, is a sample set selected from the overall "population"?
- A. Yes.
- Q. e) If a limited sample set is used for determination of these ranges, averages, norms or statistics, how is the sample set selected?
- A. All budgets submitted for a particular phase of corrective action (i.e., site classification or corrective action) are compiled, submittals that involve the same consultant are reduced such that in the end one submittal from each consultant that submitted a budget of that type for the sample period remains.
- Q. f) If a limited sample set is used for determination of these ranges, averages, norms or statistics, is any statistical evaluation conducted to determine the representativeness of the sample set to the overall population?
- A. No separate statistical evaluation is conducted. The Illinois EPA believes the selection process of the sample set effectively yields a sample set that is representative of the overall population.

(Answers to Interrogatories, Exhibit B hereto, Ex. 1, pages 5-7.)

3. The procedure whereby Mr. Bauer promulgated the Rate Sheet Rule was something that he just made up himself:

Q. Now, looking again at question Number 7 [Interrogatory 7, Exhibit B hereto; see Paragraph I(B)(2), above] and your answers to it, are you describing in those answers, ...(B) through (F), does that describe a procedure that you have ever used before in any of your other job assignments at

Illinois EPA?

A. Yeah. I'm not sure.

Q. Do you know if this particular procedure or protocol is memorialized anywhere in any Agency document as to how to prepare a rate sheet.

A. No.

Q. Okay. Have you ever seen in the literature or a learned treatise or any document that is written by a professor of statistics or something like that a description that is similar to what you've described in B through F?

A. No.

(Bauer deposition, page 49, line 6 - page 50, line 8, Exhibit F hereto).

4. In his deposition, Mr. Bauer further explained how he went about generating the data used to promulgate the Rate Sheet Rule, walking from desk to desk and randomly picking up documents consisting of LUST budget submittals (his Agency counterpart, Doug Oakley, was doing the same thing with regard to LUST reimbursement requests), then selectively tossing out some of the documents considered redundant, determining an average, then adding one standard deviation to that average. (Bauer deposition, page 33, line 3 - page 40, line 13, Exhibit F hereto).
5. From Bauer's deposition, though, it is unclear as to whether the rates appearing in the Rate Sheet Rule applicable to the two (2) categories of employees at issue in this case (Professional Engineer, Project Engineer) were even close to the categories of persons whose hourly rates appeared in the budgets inputted by Bauer in his computer database, because not all consultants use the exact same titles to describe persons who perform particular tasks, leaving the Agency to guess as to how to force-fit those rates into the categories chosen by the Agency to

list in its Rate Sheet Rule:

Q. So you had a category called Professional Engineer?

A. Yes.

Q. And one called just engineer?

A. Yes.

Q. And is that what all the consultants use to describe their project engineers, they use just engineer?

A. They might use other terms.

Q. Who made the determination that these were all apples and apples and should be lumped under one heading called engineer? Is that you?

A. I think there were a couple of us that reviewed, made that determination.

(Bauer deposition, page 41, line 14 - page 42, line 3, Exhibit F hereto).

6. Because there was no clear way for the Agency to determine what rates should be inputted into what category, the Agency employed circular logic to look to the quoted rates to determine what that person did for a living:

Q. Was there any particular protocol you were following when you were making these determinations as to where people fit into what categories?

A. It was based on rates.

Q. So the rates determined where they went more than the description of what they did?

A. To some extent.

(Bauer deposition, page 43, line 19 - page 44, line 2, Exhibit F hereto).

7. Clearly, just based on the Bauer deposition alone, the Rate Sheet Rule appears to have been thrown together in a haphazard way, based upon an unscientific sampling and analysis protocol, which Petitioner has the right to review. The data

that was used to arrive at the rates appearing in the Rate Sheet Rule are highly suspect and, unless Petitioner can review them and subject them to closer scrutiny, the Agency's use of the Rate Sheet Rule is arbitrary and fundamentally unfair.

That data is readily available for discovery:

Q. What did you do with your data that you assembled?

Where is that information that you used in making up the rate sheet? We'll call that the database.

A. It's still on my computer.

Q. So that's still in existence?

The database is still in existence on your computer?

A. Yeah, there is one database there.

Q. But the one that's in existence is the one that was used for preparing what is Plaintiff's Exhibit 3 [the Rate Sheet Rule]?

A. Yes, my database that I used.

(Bauer deposition, page 48, line 13 - page 49, line 2, Exhibit F hereto).

8. If the Rate Sheet Rule had been the product of formal rule making, Petitioner would have had a chance to participate and assist in getting it right, but Petitioner was given no such chance. The Agency, therefore, must now allow Petitioner to review the database and, to the extent that any of it supports Petitioner's claim that the rates appearing in the Rate Sheet Rule are invalid, to introduce that evidence into the record in this case.
9. Petitioner has many times requested the Agency to produce the database which was used to promulgate the Rate Sheet Rule, but the Agency has refused, and the Hearing Officer has agreed with the Agency.
10. In essence, the Agency argues that it can disapprove any rate presented in a budget (or, for that matter, in a request for reimbursement) if the Agency reviewer, in his

or her opinion, claims it is “unreasonable” because it exceeds a rule whose validity shall remain untested. The Hearing Officer’s Order adopts the “shall remain untested” part of this argument. This is fundamentally unfair.

C. Even Though the Database Used by the Agency to Create the Rate Sheet Rule Consists, in Part, of Rates Taken from LUST Reimbursement Applications, the Database Is Still Relevant to the Rates Imposed by the Agency in this Budget Review Case Because the Agency Applies the Rate Sheet Rule to Both Reimbursement Requests and Budget Reviews.

1. In paragraph 19 of its response, the Agency concedes that the information used to prepare the Rate Sheet Rule was generated from both budget reviews and requests for reimbursement, but argues that because the instant case involves only a budget review, the database is irrelevant and cannot be disclosed. The subject Order adopts the Agency’s argument on this point. If that is the case, though, the Rate Sheet Rule itself is irrelevant, and cannot be used by the Agency in deciding reasonableness of rates and costs in any budget review case. The Agency can’t have it both ways. It cannot, on one hand, rely exclusively on the Rate Sheet Rule and, on the other hand, refuse to disclose the basis upon which it was generated on the argument that some of the underlying data was and is wholly unrelated to this case. The Agency’s argument is contradictory and self-destructive.
2. And in paragraph 8 of its response, the Agency argues that any documentation concerning the Agency’s practices when reviewing requests for reimbursement will not be provided in response to Petitioner’s discovery request, not because the documentation would not lead to information that is relevant to the issues in this case, but because “the final decision under appeal does not involve any request by the Petitioner for reimbursement of costs.” The Hearing Officer embraces this

requirement by holding that the request for the database is “overly broad.”

However, the very document upon which the Agency relies to prove

“reasonableness” of rates (the Rate Sheet Rule) was generated by combining

historic rates (for fees of professionals and other personnel, for equipment, and for other costs traditionally included in both budgets and requests for reimbursement)

from both budget requests and request for reimbursements, within the LUST

program. Moreover, the resulting Rate Sheet Rule is applied in both situations.

3. In fact, at his deposition of November 25, 2003, Harry A. Chappel, the person who supervised the reviewer of the subject budget, Carol Hawbaker, testified under oath that as of the date Ms. Hawbaker made her final decision on this budget (March 28, 2003, which is the date on which Mr. Chappel signed the final decision, drafted by Ms. Hawbaker), Ms. Hawbaker used the exact same guidance or protocol in reviewing reasonableness of this budget as she uses when determining reasonableness in a request for reimbursement for expenses in a LUST remediation project.

Q. The question was:

As of March 28, 2003, was Ms. Hawbaker instructed to use different guidance or protocol in reviewing reasonableness whether it appeared in a request for a budget approval or in a request for reimbursement?

A. Not that I'm aware of.

Q. So, to your knowledge, Ms. Hawbaker used the exact same approach to determining reasonableness every time she was asked to do that up until March 28, 2003, whether it was in the form of a request for a budget review or a request for reimbursement of expenses in a LUST remediation project?

A. As far as I know, yes.

(Chappel Deposition, page 13, lines 6-20, Exhibit G hereto).

4. There is absolutely no distinction between how the Agency determines

reasonableness as it pertains to rates, whether they appear in a LUST budget application or a LUST reimbursement application. The Agency's argument, therefore, that Petitioner in this case was not seeking reimbursement, and the Hearing Officer's Order, denying the request for the database because it is "overly broad," is just wrong.

5. The database from which the Rate Sheet Rule was derived is no broader, and no less relevant, than the Rule itself. It must be produced.

II. THE INTERNAL GUIDANCE DOCUMENTS USED BY THE AGENCY TO ASSIST IN THE DETERMINATION OF THE REASONABLENESS OF COSTS INCLUDED IN THE SUBJECT BUDGET, INCLUDING THE LUST PROGRAM PROJECT MANAGER HANDBOOK AND THE DOCUMENT THE AGENCY DESCRIBES AS "IRT 500.003," ARE RELEVANT TO THE ISSUE OF REASONABLENESS, OR ARE LIKELY TO LEAD TO RELEVANT INFORMATION ON THE ISSUE OF REASONABLENESS, EVEN IF WHAT THEY SHOW IS THAT THE AGENCY DEVIATED FROM THAT GUIDANCE WHEN CUTTING THE SCOPE OF WORK, RATES, HOURS, AND COSTS IN THIS CASE.

1. In its response, in paragraphs 11 and 12, the Agency correctly states that the manner in which the Agency went about making its decision in this case is itself the focus of this appeal, and rightfully so. The Agency has arbitrarily developed and applied rules and guidance, and has unreasonably refused to disclose same and the manner in which they were prepared.
2. The requested guidance documents could show, for example, that they are to be applied absolutely and in all cases, without deviation based on special circumstances, but were not followed here. Such instructions cannot remain immune from such discovery and scrutiny by the very people against whom they are sought to be enforced. The Agency is stonewalling the entire process, forcing the LUST program applicants to guess at how the Agency reaches its decisions. This is fundamentally unfair.
3. In paragraph 13, the Agency does not deny that it has, in fact, consistently reported to the U.S. EPA that it has issued a LUST manager's handbook to its

LUST managers. However, in refusing to produce this guidance (or any guidance other than the invalid Rate Sheet Rule), it begs the question as to whether the Agency makes these decisions based on anything. Clearly, the Agency writes up protocol and guidance documents that are intended to be used in these kinds of cases, and which the Agency tells the U.S. EPA are, in fact, used by the Agency in these cases. The Agency conveniently argues in this case, though, that Carol Hawbaker, who reviewed this budget and made the disputed decisions concerning reasonableness, never bothered to read any of the Agency's materials, then advances the theory that "if the Agency didn't look at it, then the Board can't see it, either, nor can anybody else." This is a disingenuous argument, calculated to avoid answering the question of whether the Agency acted properly in cutting Petitioner's budget.

4. Asking the question of whether the Agency acted properly in cutting Petitioner's budget by propounding questions and seeking documents on that issue does not place the initial burden of proof on the Agency, but does provide necessary information for Petitioner when, after making out his prima facie proof of reasonableness, the burden shifts to the Agency and the Agency is forced to explain how it arrived at conclusions contrary to Petitioner's. Petitioner has every right to prepare its case with the information requested.

III. IT IS FUNDAMENTALLY UNFAIR TO DEPRIVE PETITIONER OF ITS RIGHT TO KNOW HOW THE AGENCY MADE ITS DECISION IN THIS CASE, AND WHAT THE AGENCY'S OWN GUIDANCE REQUIRES IN MAKING SUCH DECISIONS.

1. The fundamental purpose of adjudicated matters such as this is to determine the truth of the matter, and the basic purpose of discovery is to assist the Board in ascertaining that truth by permitting each party to learn as much about the controversy as is reasonably practical.

2. By entering the subject Order, the Hearing Officer is preventing Petitioner, and ultimately the Board, from learning the truth.
3. The scope of discovery is necessarily broad. Wilson v. Norfolk & W. R. Co., 109 Ill. App. 3d 79, 440 N.E. 2d 238, 1982 Ill. App. LEXIS 2257, 64 Ill. Dec. 686 (Ill. App. Ct. 5th Dist. 1982). The Board has recognized this in variance cases, Gallatin National Company v. Illinois EPA, PCB No. 90-183 (Nov. 26, 1990), and in enforcement cases, EPA v. Decatur Sanitary District, et al., PCB No. 77-157 (March 2, 1978) (Agency ordered to reveal factual bases for its experts' opinions, the Board stating that discovery "should be as wide as possible with respect to the facts of the case in order to allow the issues to be developed as fully as possible by the parties").
4. It shouldn't matter, in a truth-seeking exercise, that the Board may be limited to reviewing "the record" in permit appeals, since, in effect, what is being sought here is part of the record, or at least should be part of the record. To the extent that it is "beyond the record" (and Petitioner does not concede that it is), the Board has previously allowed limited discovery, beyond the record developed at the county board in a siting case, as appropriate to determine that the governing body satisfied the statutory requirement of fundamental fairness. Sam Dimaggio, et al. v. Solid Waste Agency of Northern Cook County, et al., PCB No. 89-138 (October 27, 1989), adopting the holding in E&E Hauling, Inc. v. PCB, 116 Ill.App. 3d 586, 587, 415 N.E. 2d 555 1983 Ill. App. LEXIS 2081, 71 Ill. Dec. 587 (Ill. App. Ct. 2d Dist. 1983).
5. Finally, in the Agency's response at Paragraph 18, the Agency suggests that internal Agency guidance in LUST program appeals have never before been ordered by Board hearing officers to be produced in response to motions to compel, but that is not the information and belief of counsel for Petitioner. In

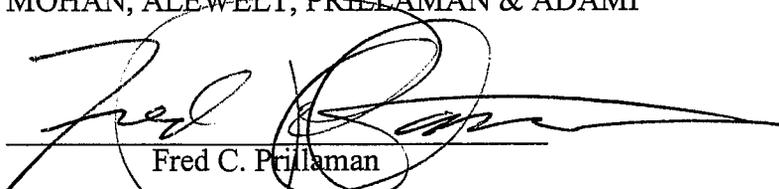
Owens Oil Co. v. IEPA, PCB 98-32, for example, where the attorneys of record were the same two attorneys who are the attorneys of record in the case presently before the Board, the then-applicable "LUST Managers Handbook" was, in fact, ordered to be furnished by the Hearing Officer over the Agency's objections, and was furnished, on information and belief of Petitioner's counsel. See Exhibits H, I and J, hereto, being the cover sheets for the manuals then produced. Owens prevailed in that case. Unfortunately, the LUST Manager's Handbook that was produced in the Owens case is now outdated because it related to what the Agency calls "old law" LUST cases. What we need now, to adequately review the basis upon which the Agency made its disputed decisions in this case, are the same documents previously ordered to be produced, but this time under the "new law" program. It is highly prejudicial to Petitioner, and fundamentally unfair, to keep this information from Petitioner in the preparation and presentation of its case. It must be produced.

Respectfully submitted,

ILLINOIS AYERS OIL COMPANY, Petitioner

By MOHAN, ALEWELT, PRILLAMAN & ADAMI

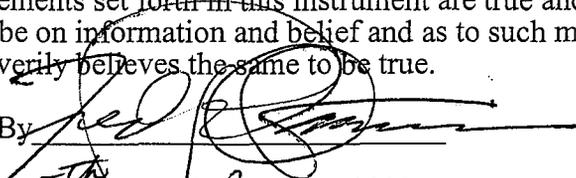
By


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VERIFICATION

The undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

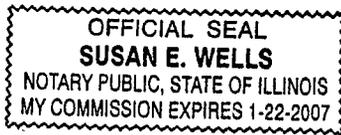
By 

Subscribed and sworn to before me this 5th day of December, 2003


Notary Public

(Notarial Seal)

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